No. ——

In the Supreme Court of the United States

OCTOBER TERM, 1957

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

FROZEN FOOD EXPRESS, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

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JULY 12, 1957.

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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Texas is reported at 148 F. Supp. 399, and is set forth in Appendix A to this statement. Reproduced as Appendix B is the judgment entered on March 14, 1957. The report of the Commission is printed at 52 M. C. C. 511. Ten copies thereof are being filed with the clerk.

JURISDICTION

The action was brought under 28 U. S. C. 1336 to set aside an order of the Interstate Commerce Commission. The judgment of the District Court

was entered on March 14, 1957 and notice of appeal was filed in that court by the Commission on May 13, 1957.

The jurisdiction of this court to review the decision of the District Court on direct appeal is conferred by 28 U. S. C. 1253 and 2101 (b) and is sustained by the decision in the former appeal in this action, *Frozen Food Express* v. *United States,* 351 U. S. 40, where this Court held the order to be reviewable.

STATUTES INVOLVED

The National Transportation Policy (49 U. S. C., preceding §§ 1, 301, 901, and 1001), reads as follows:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation service, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and

equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 203 (b) (6) of the Interstate Commerce Act (49 U. S. C. 303 (b) (6)) reads, in part, as follows:

Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment, shall be construed to include * * * (6) motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), *agricultural* (including horticultural) *commodities* (*not including manufactured products thereof*), if such motor vehicles are not used in carrying any other property, or passengers, for compensation * * *. [Emphasis added.]

Section 206 (a) reads, in part, as follows:

* * * no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway * * * unless there is in force with respect to such car-

rier a certificate of public convenience and necessity issued by the Commission authorizing such operations: * * *.

QUESTION PRESENTED

Whether the District Court, in setting aside the conclusion of the Interstate Commerce Commission in *Determination of Exempted Agricultural Comodities,* 52 M. C. C. 511, that the exemption from motor carrier economic regulations provided by Section 203 (b) (6) of the Interstate Commerce Act for "agricultural commodities (not including manufactured products thereof)" does not apply to the transportation of powdered milk, dried egg powder, dried egg yolks, buttermilk and quick frozen fruits and vegetables, misapplied the continuing substantial identity test laid down by this court in *East Texas Motor Freight Lines, Inc.*, v. *Frozen Food Express,* 351 U. S. 49.

STATEMENT

This case arises out of an action commenced in 1954 in the United States District Court for the Southern District of Texas, seeking to set aside the Commission's decision in *Determination of Exempted Agricultural Commodities, supra,* insofar as it held that the transportation of certain commodities was not exempt under Section 206 (b) (6). At the same time, the appellee commenced another action in the same court seeking to set aside an order of the Commission directing appellee to cease and desist from the interstate

transportation of fresh and frozen meat and fresh and frozen dressed poultry without an appropriate certificate or permit under Part II of the Act. In the latter case, the three-judge court held that the transportation of fresh and frozen meat was not exempt under Section 203 (b) (6), but that the transportation of fresh and frozen dressed poultry was exempt. Upon appeal from that portion of the decision of the lower court relating to fresh and frozen dressed poultry, this Court affirmed—with Justices Burton, Frankfurter, Minton, and Harlan dissenting. *East Texas Motor Freight Lines, Inc.* v. *Frozen Food Express*, 351 U. S. 49.

In the instant case, the three-judge court originally held that the Commission's decision in the *Determination* proceeding was not a reviewable order (128 F. Supp. 374). Upon appeal, this Court reversed, holding that the Commission's decision in that proceeding was reviewable, and remanded the case to the court below for adjudication of the issues raised by the complaint. *Frozen Food Express* v. *United States*, 351 U. S. 40. Following the remand, the court below held that the following commodities were exempt agricultural commodities under Section 203 (b) (6):

> * * * frozen whole eggs; dried egg powder, dried egg yolks; clean rice; rice bean; rice polish; pasteurized milk*; fresh cut up vegetables in cellophane bags; fresh vegetables washed, cleaned and packaged

in cellophane bags or boxes*; fruits or vegetables (quick frozen); shelled peanuts; peanuts shelled ground; killed and picked poultry* (although not drawn); rolled barley; cottonseed hulls; beans* (packaged, dried artificially or packed in small containers for retail trade); dried fruits* (dried mechanically or artifically); peaches peeled, pitted and placed in cold storage in unsealed containers; strawberries canned in syrup in unsealed containers and placed in cold storage; milk, skimmed, vitamin D*; milk, powdered; buttermilk; feathers; frozen milk and cream; cotton linters; chopped hay; seeds, deawned or scarified; and redried tobacco leaves.*[1]

At the same time, the court below held that the following commodities were not within the exemption:

> * * * slaughtered cattle; fresh meat; meat products; cottage cheese; cream cheese; butter; cottonseed meal; fruits and vegetables canned; and milk condensed.

THE QUESTION IS SUBSTANTIAL

We submit that the decision below, in holding that powdered milk, dried egg powder, dried egg yolks, buttermilk and quick frozen fruits and vegetables are agricultural commodities whose transportation is exempt from motor carrier economic regulation under Section 203 (b) (6)

[1] There was no dispute between the parties over those commodities marked with an asterisk.

has erroneously applied this Court's decision in *East Texas Motor Freight Lines, Inc.* v. *Frozen Food Express, supra.* The correct classification of these commodities in relation to Section 203 (b) (6) is of great practical importance to shippers and carriers, and to the Commission in the administration of the Interstate Commerce Act.

In the *East Texas* case, in holding that fresh and frozen dressed poultry were exempt agricultural commodities under Section 203 (b) (6), rather than "manufactured products thereof," this court stated that the exemption for agricultural commodities is "lost not by incidental or preliminary processing but by manufacturing" (351 U. S. at 52). Recognizing the difficulty of drawing a practical line between processing and manufacturing, this Court concluded that "where the commodity retains a continuing substantial identity through the processing stage we cannot say that it has been 'manufactured' within the meaning of Section 203 (b) (6)" (351 U. S. at 54).

The "continuing substantial identity" test thus laid down by this Court for distinguishing "agricultural commodities" from "manufactured products thereof," is not substantially different from the Commission's definition of "agricultural commodities", as "agricultural commodities in their natural state and those which, as a result of treat-

ing or processing, have not acquired new forms, qualities, properties, or combinations" (52 M. C. C. at 521). However, the decision made it clear that a majority of this Court believed that to some extent the Commission had given too narrow a scope to the agricultural commodity exemption in Section 203 (b) (6).

We submit that the decision below misapplies this Court's decision in the *East Texas* case and, in so doing, has both endangered the Congressional objective of creating a healthy system of public carriers and ignored the evidentiary record supporting the Commission's action.

This Court has repeatedly recognized that the purpose of Congress in enacting the Motor Carrier Act of 1935 (now Part II of the Interstate Commerce Act) was to provide a system of healthy and responsible motor common and contract carriers—through regulation of entry into interstate motor transportation, rates, safety, and insurance. *American Trucking Assn's* v. *United States*, 344 U. S. 298, 312. In the *East Texas* case, this Court noted that the exemption from economic regulation in Section 203 (b) (6) reflects Congressional "recognition that the price which the farmer obtains for his products is greatly affected by the cost of transporting them to the consuming market in their raw state or after they have become marketable by incidental processing" (351 U. S. at 51).

We do not urge that this exemption should be given a grudging or mechanically narrow construction. Rather, we contend that under the National Transportation Policy, Section 203 (b) (6), like the other provisions of the Act, must "be administered and enforced with a view to carrying out [that policy] to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices."

The decision below thwarts the National Transportation Policy, as well as the more specific purpose of Part II of the Act to promote a strong system of public motor carriers, by extending the exemption of Section 203 (b) (6) to the products of industry. Such undue expansion of the exemption, without demonstrable benefit to farmers, erodes the economic base of the authorized carriers upon whom most shippers—particularly small shippers—are dependent for transportation service.

The court below further erred in giving no weight to the undisputed evidence upon which the Commission based its conclusions as to the commodities here involved. The Commission's

report in *Determination of Exempted Agricultural Commodities, supra*, was issued only after extensive hearings in which evidence was received from many witnesses, including representatives of the Department of Agriculture. Expert witnesses from that Department testified that the fresh and frozen dressed poultry involved in the *East Texas* case were not manufactured products. In sharp contrast, expert witnesses from the Department of Agriculture testified that quick frozen fruits and vegetables, powdered milk, dried egg powder, dried egg yolks, and buttermilk are manufactured products. The Commission's findings are based expressly upon this undisputed testimony. 52 M. C. C. 528–534 (quick frozen fruits and vegetables), 545–547 (dried egg powder and dried egg yolks), and 550–551 (powdered milk and buttermilk).

The Commission found, as to quick frozen fruits and vegetables (52 M. C. C. at 534), that:

> Although no one questions the examiner's conclusion that frozen or quick-frozen fruits and vegetables are manufactured products, in view of certain questions raised respecting other frozen commodities, some discussion of these items will be helpful. The quick freezing of fruits involves the addition of other ingredients, principally sugar or sirup. Since a "combination" results, it follows

> in light of the foregoing definition of "manufacture" that quick-frozen fruits are manufactured products. In the quick freezing of vegetables, the commodities are customarily blanched or scalded prior to freezing, and sometimes ascorbic acid is added, thus enabling the product to be held in that condition until ready for use. * * *

The court below, while noting that "The processing to which the fresh product is subjected, after leaving the farmer's hands and before appearing in the familiar frozen-food carton on the grocers' shelves, is extensive and complicated", concluded in effect that this phase of the case was governed by the holding in *Home Transfer & Storage Co. v. United States*, 141 F. Supp. 599 (W. D. Wash.), affirmed summarily 352 U. S. 884, that the transportation of quick frozen fruits and vegetables is exempt under Section 203 (b) (6).

We submit that the summary affirmance of the *Home Transfer* decision should not preclude this Court from reexamining the status of quick frozen fruits and vegetables in the broader context of the instant case. They involve a processing which is far more than incidental to making them marketable. They are the products of industrial plants rather than of the farm. From 1935 until the *Home Transfer* decision in 1956, their status as manufactured products which could be transported in interstate commerce only

by authorized carriers was unchallenged,[2] and such carriers made large investments in refrigerated equipment upon that assumption. The huge volume of quick frozen fruits and vegetables which is transported in interstate commerce makes the question one of substantial importance to the entire transportation and food industries.

The decision below is clearly erroneous in classifying powdered milk as an exempt agricultural commodity rather than a "manufactured product." The uncontroverted expert testimony before the Commission was to the effect that dehydration results in a manufactured product. Moreover, this holding is inconsistent with the further holding of the court below that condensed milk is a manufactured product not covered by Section 203 (b) (6)—since condensation obviously represents a less drastic process than dehydration. Since, as we are informed, powdered milk is produced in an annual volume of

[2] In the *Home Transfer* case, the Department of Justice joined with the Commission in defending in the district court the Commission's conclusion that quick frozen fruits and vegetables are not exempted agricultural commodities under Section 203 (b) (6). In the instant case, upon remand by this Court and following the district court decision in the *Home Transfer* case, the Departments of Justice and Agriculture filed in the court below a joint brief stating with respect to frozen fruits and vegetables that "In deference to [the *Home Transfer*] decision the United States and the Secretary of Agriculture recede from their previously expressed endorsement of the Commission's contrary findings and conclusion."

3 billion pounds, its proper classification as a manufactured product is important for carriers and shippers alike.

For the same reasons, we submit that the decision below is erroneous in holding that dried egg yolks and dried egg powder are exempt agricultural commodities under Section 203 (b) (6).

The court below also held that buttermilk is an exempt agricultural commodity—while simultaneously holding that butter is a manufactured product. Since, we contend, butter clearly is a manufactured product under the "continuing substantial identity" test, it follows that buttermilk also is a manufactured product since both result from the same churning process.[3]

In *Frozen Food Express* v. *United States*, *supra*, this Court recognized the practical importance to carriers and shippers of correct and authoritative interpretation of the agricultural commodity exemption, which led the Commission to institute the *Determination* proceeding and this Court to hold that the Commission's conclusions were reviewable by the courts. We submit that the decision below demonstrates the need for further consideration of the problem by this Court.

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[3] In the court below, the Departments of Justice and Agriculture defended the Commission's determination that powdered milk, dried egg yolks, dried egg powder, and buttermilk are manufactured products.

CONCLUSION

For the reasons stated, we believe that the question presented by this appeal is substantial and is of such public importance as to require plenary consideration, with briefs and oral argument, for its resolution.

Respectfully submitted.

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Interstate Commerce Commission,
Washington 25, D. C.

JULY 12, 1957.

APPENDIX A

In the

DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Civil Action No. 8285

FROZEN FOOD EXPRESS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

December 31, 1956

Before HUTCHESON, Chief Circuit Judge, and CONNALLY and KENNERLY, District Judges.

CONNALLY, District Judge:

The history of this litigation and the issues which it raises are fully reflected in the opinion of this Court on original submission (128 F. Supp. 374) to which reference is here made. Our dismissal of the action on that occasion, on the ground that the challenged order of the Interstate Commerce Commission was one not subject to judicial review, was reversed by the Supreme Court (351 U. S. 40), and the action remanded for consideration on the merits. This requires a re-

view of the action of the Interstate Commerce Commission in classifying the many commodities enumerated in the petition of the Plaintiff, or in the intervening petition of the Secretary of Agriculture, as "agricultural commodities" (in which event under § 303 (b) (6) of Title 49, U. S. C. A., their carriage by a motor carrier is substantially free from I. C. C. regulation and control), or as "manufactured products" of agricultural commodities, in which event they enjoy no such exemption.

The commodities enumerated in Plaintiff's complaint, classification of which we are called upon to review are: slaughtered cattle; fresh meat; meat products; frozen whole eggs; dried egg powder; dried egg yolks; cottage cheese; cream cheese; clean rice; rice bean; rice polish; pasteurized milk; fresh cut up vegetables in cellophane bags; fresh vegetables washed, cleaned and packaged in cellophane bags or boxes; fruits or vegetables (quick frozen); shelled peanuts; peanuts shelled ground; killed and picked poultry (although not drawn); rolled barley; butter; cottonseed meal; cottonseed hulls; beans (packaged, dried artificially or packed in small containers for retail trade); fruits and vegetables canned; dried fruits (dried mechanically or artificially); peaches peeled, pitted and placed in cold storage in unsealed containers; strawberries canned in syrup in unsealed containers and placed in cold storage; milk condensed; milk, skimmed, vitamin D; milk, powdered; buttermilk; feathers; frozen meat; frozen dressed poultry.

Those raised by the petition in intervention of the Secretary of Agriculture are as follows:

frozen milk and cream; cotton linters; chopped hay; seeds; deawned or scarified; redried tobacco leafs [leaves].

Since this action was here before, recent decisions have removed the uncertainty surrounding a number of these commodities. In the related case of *East Texas Motor Freight Lines, Inc.* v. *Frozen Food Express* (128 F. Supp. 374 at 379), we considered slaughtered cattle, fresh and frozen meat and meat products to be nonexempt, from which portion of the judgment in that proceeding no appeal was taken. Our holding that fresh and frozen dressed poultry was exempt was affirmed (351 U. S. 49), wherein the Supreme Court announced the so-called "continuing substantial identity" test, quoting from *Anheuser-Busch Assn.* v. *U. S.* (207 U. S. 556 at 562):

> "* * * Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labor and manipulation. But something more is necessary, as set forth and illustrated in *Hartranft* v. *Wiegmann*, 121 U. S. 609. There must be transformation; a new and different article must emerge, 'having a distinctive name, character or use'."

and saying

> "At some point processing and manufacturing will merge. But where the commodity retains a continuing substantial identity through the processing stage, we cannot say that it has been 'manufactured' within the meaning of § 203 (b) (6)."

Applying this most recent test, a three-judge District Court of the District of New Jersey in *Consolidated Truck Service, Inc.* v. *U. S.* (144 F. Supp. 814), held that shelled, raw nuts were exempt, and that the incidental processing to which they were subjected, namely, shelling, drying, cleaning, polishing, bleaching, grading, sorting and refrigerating, did not constitute manufacture. And the District Court for the Western District of Washington held frozen fruits and vegetables to be exempt in *Home Transfer and Storage Company* v. *U. S.* (141 F. Supp. 599). This holding was affirmed, without opinion, by the Supreme Court November 5, 1956 (352 U. S. 884).

Prior to this action by the Court, frozen fruits and vegetables had become a particular bone of contention in the prolonged struggle over the extent and scope of the agricultural exemption. There is a heavy volume of motor carrier traffic in this commodity. The processing to which the fresh product is subjected, after leaving the farmers' hands and before appearing in the familiar frozen-food carton on the grocers' shelves, is extensive and complicated. In holding frozen fruits and vegetables to be exempt, the *Home Transfer* case has gone far toward settling the entire controversy in favor of the liberal interpretation of the exemption urged by the farming interests, the Department of Agriculture, and those motor carriers (as the Plaintiff) who seek to avoid I. C. C. control in the carriage of these commodities.

With this background, the following commodities, of agricultural origin, having undergone some

processing but retaining their original identity, we hold exempt: frozen whole eggs; dried egg powder; dried egg yolks; clean rice; rice bean; rice polish; pasteurized milk; fresh cut up vegetables in cellophane bags; fresh vegetables washed, cleaned and packaged in cellophane bags or boxes; fruits or vegetables (quick frozen); shelled peanuts; peanuts shelled, ground; killed and picked poultry (although not drawn); rolled barley; cottonseed hulls; beans (packaged, dried artificially or packed in small containers for retail trade); peaches peeled, pitted and placed in cold storage in unsealed containers; strawberries canned in syrup in unsealed containers and placed in cold storage; milk, skimmed, vitamin D; milk, powdered; buttermilk; feathers; frozen milk and cream; cotton linters; chopped hay; seeds, dewawned or scarified; redried tobacco leaves.

For the reason set forth in our opinion *Frozen Food Express* v. *U. S.* (128 F. Supp. 374 at 379 *et seq.*), we hold to be non-exempt the following: slaughtered cattle, fresh meat, meat products. We likewise hold non-exempt, under the evidence which deals with commercial creamery products, as "manufactured products" of agricultural commodities the following: cottage cheese; cream cheese; butter; cottonseed meal; fruits and vegetables canned; milk condensed. Each of these products has acquired a new identity, with new properties, and is devoted to new and different uses than its original principal ingredient. As result of combination with other constituents, of treatment and processing by varied types of machinery and equipment, a new product has emerged. If the semanticist urges that a can of

peaches or of condensed milk may not properly be described as a "manufactured product," it may well be that these items illustrate the point at which processing merges with manufacturing.

Except to the extent noted above, the determination, classification, and order of the Interstate Commerce Commission holding commodities hereinabove enumerated to be non-exempt are not in accord with law, and the enforcement thereof will be enjoined.

Clerk will notify counsel.

Done at Houston, Texas, this 31st day of December, 1956.

/s/ J. C. HUTCHESON, JR.
Chief Judge, Fifth Circuit.

/s/ BEN C. CONNALLY,
United States District Judge.

/s/ T. M. KENNERLY,
United States District Judge.

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[1] In the *Determination Proceedings* before the Interstate Commerce Commission, no exception was taken to the holding that canned goods were exempt. Here, the United States (through the Department of Justice), the Secretary of Agriculture, the Interstate Commerce Commission and all other Defendants and Intervenors urge that canned goods are non-exempt. Only the plaintiff contends to the contrary.

APPENDIX B

In the

DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Civil Action No. 8285

FROZEN FOOD EXPRESS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

FINAL JUDGMENT

This action, to enjoin and set aside an order of the Interstate Commerce Commission, having come on for final hearing on the 13th day of September 1956, before a duly constituted Three-Judge District Court, convened pursuant to Sections 2284 and 2321–2325, Title 28, United States Code, consisting of the undersigned judges; and the Court having considered the pleadings and evidence and the briefs and argument of counsel for the respective parties, and being fully advised in the premises; and having on the 31st day of December, 1956, filed herein its opinion, containing its findings of fact and conclusions of law; now, in accordance with the said opinion, findings and conclusions, it is hereby

ORDERED, ADJUDGED, and DECREED as follows:

(1) The decision and order of the Interstate Commerce Commission entered April 13, 1951, in a proceeding docketed by the Commission as No. MC–C–968, *Determination of Exempted Agricultural Commodities,* is enjoined, suspended, annulled, vacated and set aside insofar as the Commission found and concluded that frozen whole eggs; dried egg powder; dried egg yolks; clean rice; rice bean; rice polish; pasteurized milk; fresh cut up vegetables in cellophane bags; fresh vegetables, washed, cleaned and packaged in cellophane bags or boxes; fruits or vegetables (quick frozen); shelled peanuts; peanuts shelled ground; killed and picked poultry (although not drawn); rolled barley; cottonseed hulls; beans (packaged, dried artificially or packed in small containers for retail trade); dried fruits (dried mechanically or artificially); peaches peeled, pitted and placed in cold storage in unsealed containers; strawberries canned in syrup in unsealed containers and placed in cold storage; milk, skimmed, vitamin D; milk, powdered; buttermilk; feathers; frozen milk and cream; cotton linters; chopped hay; seeds, dewawned or scarified; and redried tobacco leaves are not agricultural commodities within the meaning of Section 203 (b) (6) of the Interstate Commerce Act [49 U. S. C. 303 (b) (6)]; and

(2) All other relief sought by the plaintiffs herein, including the Secretary of Agriculture as

Intervening Plaintiff, be and the same is hereby denied.

This the 14th day of March, 1957.

J. C. HUTCHESON,
Chief Judge, United States Court of Appeals for the Fifth Circuit.

BEN C. CONNALLY,
United States District Judge.

T. M. KENNERLY,
United States District Judge.

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